

Denver Law Review

Volume 16 | Issue 9

Article 7

1939

Vol. 16, no. 9: Full Issue

Dicta Editorial Board

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Recommended Citation

16 Dicta (1939).

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DICTA

THE DENVER BAR
ASSOCIATION



THE COLORADO BAR
ASSOCIATION

20 cents a copy

\$1.75 a year

Vol. XVI

SEPTEMBER, 1939

No. 9

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Published monthly by the Denver and Colorado Bar Associations
and devoted to the interests thereof.

Address all communications concerning:

Editorial Matters of the Denver Bar Association, to Dicta, Roy O. Samson, Editor-in-Chief, 1020 University Bldg., Denver, Colo.

Editorial Matters of the Colorado Bar Association, to Wm. Hedges Robinson, Jr., 410 Midland Savings Bldg., Denver, Colo.

Advertising, to Dicta, Sydney H. Grossman, Business Manager,
618 Symes Bldg., Denver, Colo.

Subscriptions to Dicta, James A. Woods, Secretary Denver Bar Association, 930-35 1st National Bank Bldg., Denver, Colo.

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WHY DECEMBER 31ST?

A Suggestion for Closing the Business Year

By JOHN G. LARSON, *Manager, Ernst and Ernst, Certified Public Accountants*

IT IS recognized that the calendar is a device for measuring time rather than determining time. The effect of the seasons on all of our activities is not due to the space occupied on the calendar by these particular seasons. Yet many businesses accept the calendar period from January 1st to December 31st as their accounting year. A large majority of Colorado corporations measure the results of their operations over the calendar year period. A classification of 295 businesses incorporated in Colorado in 1938 (where the names, as recorded in the office of the Secretary of State, indicate the nature of the business) shows that some 77% probably would find a year other than the calendar year best suited to them. But only about 10% of the active corporations in Colorado report income for tax purposes on the basis of a year which does not end on December 31st. On the assumption that the corporations organized in 1938 are representative of all Colorado corporations, something like 67% of those companies are using the calendar year, whereas some other fiscal year would be preferable.

Once a closing date has been adopted it is inconvenient to make a change. For that reason, it is important that those who are instrumental in the organization of businesses should use their influence to specify in the by-laws the accounting period which truly concurs with the year's activities. This is called by its proponents "the natural business year." Most concerns are seen to have an annual cycle of operations. A large portion of the year's activities is carried on during a part of the year, while at other times there is less activity. The natural year is a twelve-months period embracing a complete cycle of the operations of the business. The closing date should precede the beginning of the activities of the new season

but should follow the past season sufficiently to permit the maximum conversion of inventories and receivables into cash. The occasional concurrence of this period with the calendar year is purely coincidental. Any other year than the natural year will combine the results of operations for parts of two different cycles or natural business years. Data collected under the operating conditions of one such year will be combined with those collected under another. This combination will not accurately reflect the results obtained during either natural business year.

From the preponderance of businesses using the calendar year as a basis for closing their books and reporting income, it might seem that some requirement of law or expediency made this necessary. The custom was given added impetus by the Federal Revenue Act of 1909 which levied an excise tax on corporations and associations, and required them to report on a calendar year basis. Many which had previously been using a different year switched to the calendar year for convenience in complying with this law. A number of these voiced objections to the calendar year requirement. This was corrected in the income tax law passed in 1913. It provided that a taxpayer might report income on a yearly basis other than the calendar year, provided that the books were kept on that other basis. The Colorado income tax law of 1937 is patterned after the Federal Revenue Act of 1936 and contains a similar provision. One possible inconvenience to a corporation using a fiscal year lies in the annual report required to be filed with the Secretary of State of Colorado. This report must be filed by March 15th of each year and must contain a financial statement as of some date not more than seventy-five days prior to March 15th. If the closing date does not fall within this seventy-five day period the statement as of the close of the natural year cannot be used. Many corporations prepare, or can prepare without great difficulty, a balance sheet as of a date other than the annual closing date. The possibility that the inconvenience of preparing a statement at an interim date for this report may deter some companies from adopting their

natural business year, indicates that a change in the statute should be considered.

Although for 1913 and subsequent years a business could report income for income tax purposes on the basis of its fiscal year, there were still some inconveniences and disadvantages in using other than a calendar year. Since these are still sometimes referred to as reasons for following the calendar year, it should be noticed that they have now been removed from the income tax laws. Until 1934, new revenue acts always became effective January 1st. If the taxpayer's taxable period fell partially in each of two years for which different laws were effective, he was compelled to apportion his income between the two periods and compute the tax on each portion under the rates of the applicable Revenue Act. The 1934 and subsequent Revenue Acts, however, have provided that they should become effective for each taxpayer, with his first taxable period beginning after the previous December 31st. Thus, a taxpayer is liable for income taxes under the previous Revenue Act until he has a taxable period which begins January 1st or later in the year in which the new law is enacted.

Not only has the inconvenience been removed, to one using a taxable year not ending on December 31st, of computing the amount of tax under two sets of rates, but a distinct benefit may be derived. This is true of taxpayers whose taxable year begins after the enactment of the new law and prior to December 31st of the enactment year. The Revenue Act of 1936 was approved June 22nd; that of 1938 on May 28th. The provisions apply to taxable years beginning after December 31st of the previous year. All transactions of businesses whose taxable years begin before the enactment date are taxed under the new law before its provisions are known. Those taxpayers whose first year taxable under the new law does not begin until some time after the enactment date, have an opportunity to study the changes before they are liable for taxes thereunder. Since the period for which they are liable under the old law has not elapsed, they can take steps toward minimizing taxes by carrying out contemplated transactions under the provisions of either, whichever are the more favorable.

Also, by this provision the incidence of higher tax rates is delayed for a taxpayer using a taxable year not ending December 31st. Adversely, relief from taxes offered by new provisions does not come so soon. The 1936 and subsequent Revenue Acts contain a provision removing a possible disadvantage to corporations desiring to change from a calendar to a fiscal year. Previously, a taxpayer wishing to make this change was required to place the income for the short period between the close of the old and the beginning of the new fiscal year on an annual basis. This was likely to result in a greater amount of taxes if a larger percentage of the income were earned during this interim period. The new provision in Section 47(c) provides that income of corporations for short periods, due to a change in the accounting period, shall not be placed on an annual basis.

The use of a natural year was of great benefit to corporations with respect to the undistributed profits tax provisions of the Revenue Act of 1936. Income could be more accurately estimated in advance of the closing date so that the tax could be minimized by payment of the necessary dividends. In addition, the financial condition being more liquid at this time, the dividends could more likely be paid without borrowing for the purpose. While the importance of paying dividends to minimize income taxes is much less under the Revenue Act of 1938, the advantage still lies with the corporation using its natural year.

With the increasing complexity of tax laws and the growing tax burden, accurate annual determination of income for tax purposes becomes more important. In several of the paragraphs that follow, reference is made to the effect of a properly-selected accounting period on the accurate calculation of income. It is not that the total income over a number of years will be different, but that income will be more correctly attributed to the period in which earned. Mistakes in the attribution of income to periods would be minimized and consequent overpayments of income taxes for some years, and in total, would be avoided.

Additional advantages to be derived through the use of

a natural business year are numerous. The procedure of closing the books and measuring the results of operations for the year is simplified. Neither will the interference of these activities with the regular routine of the business be as great. Employees' time will not be required when they should be occupied in regular activities. The annual audit can be conducted with the minimum of inconvenience to the office force.

The inventory, being smaller, is more easily and accurately taken at the close of a natural period. Employees' time is not so occupied by regular duties and they can devote more care to taking the inventory. Neither is the employment of additional help for this job so likely to be required.

Receivables due from customers are usually at the low point and it is easier to determine the proper reserve for losses on uncollectible accounts. The correctness of the determination of operating results and income for any period is affected by the accuracy of this reserve. Any means which will obtain a truer valuation of the receivables will enhance the accuracy and value of the annual statements.

The close of the natural year is the best time for a comparison of the year's operating results with previous years, and for future planning. Data for comparison will be homogeneous, based on the flow of transactions for completed and uniform periods of activity. Executives will be somewhat relieved of other duties and can give more attention to studying the results of operations, comparing them with those for prior periods and forming policies for the future.

At the close of the natural period the statements of the company will show it in its best financial position. Greater liquidity will have been obtained because of the reduction in the inventory and the collection of receivables. Cash thus obtained will have been used to pay off liabilities. Concerns using a calendar year which is not their natural year often claim that statements as of December 31st do not fairly present their financial position. Consequently, they often reduce inventories, avoid commitments and otherwise attempt to improve their ratio of current assets to current liabilities. The loss resulting from this curtailing of operations, when they should be in full swing, is evident. If the concern were using

a year adopted to its cycle of operations, it would appear at its best, without the use of artificial and expensive means.

The responsibility for the proper selection of a business year rests with the management. The adoption of accounting periods ending at times other than December 31st is of interest also to bankers, credit men and certified public accountants. They are all concerned with the statements presenting most accurately the financial condition and operating results. In addition, with the present large majority of corporations closing on December 31st, the accountants particularly find themselves deluged with work during a few months of the year and comparatively idle during the remainder. During these few months they must work under a great deal of pressure and they find it necessary to make temporary additions to the staff. Thus, they often cannot devote time to giving helpful advice and suggestions to the degree which would be possible at another time. The management which is interested in obtaining the greatest value from the services of these agencies would do well to consider this along with other advantages in selecting a natural business year.

The annual cycle of operations in certain lines of business and the period which constitutes their natural business year are apparent from a cursory examination. For others, an analysis of the effect of the seasons on operations and conditions existing during the year, will indicate what it is. In this connection the fluctuations throughout the year in sales volume, inventories, receivables and current liabilities should be considered. The practice of others in the industry will serve as a guide, although circumstances peculiar to the company in question may indicate a different date. In cooperation with the research department of Dun & Bradstreet, the Natural Business Year Council makes studies of industries to determine their most logical closing dates and publishes its findings in order to affect a more widespread adoption of the natural business year. A list of closing dates suggested by the Natural Business Year Council follows. Dates suggested as the result of studies, other than those of the Council, are in parentheses and those marked (*) are confirmed by other such studies.

<i>Trade or Industry</i>	<i>Closing Date, Last Day of:</i>
Advertising, outdoor	March
Advertising agencies	July (December)
Agricultural implements—mfr.	September (June or October)
Air transportation companies	April
Airports	April
Automobiles—retail	November (October)
Automotive accessories—wholesale	January
Awnings and sunshades—mfr.	August
Bakeries	June
Barber shop and beauty parlor supplies—mfr.	September
Beverages, non-alcoholic—mfr.	September (*)
Books—publishing	June (January or December)
Book stores	June (*)
Breweries	September
Bricks—mfr.	March (*)
Brokers	November
Brooms and brushes—mfr.	June
Building contractors	February (December to April)
Candy—mfr.	April
Candy—wholesale	July
Canning	March to May (February to May)
Canvas goods—mfr.	November
Cemeteries	March
Charitable institutions	May or November
Clay and stone products—mfr.	October (December)
Cleaning and dyeing establishments	November
Clothing, men's—retail	January
Coal—mining	March (*) or April
Coal—retail	May
Coal—wholesale	April
Colleges	June (*)
Containers, paper—mfr.	April
Contractors, general	February
Crockery and glassware—mfr.	January
Dairy and produce companies	February or March (*)
Department stores	January (*)
Drugs—retail	September
Drugs—wholesale	June
Dry goods—wholesale	November
Electrical appliances—retail	June
Feed—mfr.	May or June
Filling stations	September
Florists—retail	September (June)
Flour milling	May or June (*)
Foundries and machine shops	January (December)

<i>Trade or Industry</i>	<i>Closing Date, Last Day of:</i>
Fruit and vegetable brokers.....	June
Furniture—mfr.	November (June)
Furniture—retail	June
Garages	September
Gasoline, refining	October
General merchandise—retail	January
Gift shops	May
Glass—mfr.	June (December)
Grain dealers	June
Grain, mills and elevators.....	May or June
Groceries—retail	June
Groceries—wholesale.....	June (*)
Hardware—retail	(December)
Hatcheries, chicken	June
Hats—mfr.	October
Heating and plumbing contractors.....	(December)
Hospitals	(December)
Hotels, residential.....	June (July)
Hotels, resort.....	Last month of season (*)
Ice, artificial—mfr.	October
Ice cream—mfr.	(December)
Jewelers—mfr. and silversmiths.....	November or March (January or February)
Jewelry and silverware—retail	January (*)
Laundries	June
Leather goods—retail	January
Lime—production	November
Lumber products—mfr.....	October
Lumber—retail	(November)
Mail order houses.....	January (December)
Mattresses—mfr.	July
Meat, packing.....	October (*)
Millinery—retail	June
Motion picture exhibitors.....	(June to August)
Musical instruments—retail	June
Newspapers	August
Office buildings.....	May
Office supplies—retail	May
Oil production	June (December)
Oil well drilling contractors.....	July (*)
Paints and varnishes—mfr.....	November (December)
Paper—wholesale	June
Paving contractors.....	March
Photographers	April
Plumbers materials—wholesale.....	February

<i>Trade or Industry</i>	<i>Closing Date, Last Day of:</i>
Pottery—mfr.	June (*)
Poultry farms	September
Public utilities	(December)
Radio—wholesale	January
Radio—retail	March
Railroads, street and interurban	June
Ready-to-wear, ladies'—retail	January
Real estate—agencies	September
Real estate holding companies	September
Restaurants	June
Roofing and waterproof paper—mfr.	June
Rubber goods—mfr.	October (June)
Rubber tires—mfr.	October (November)
Schools, private	June or August
Seeds—wholesale and retail	June
Sheet metal—mfr.	March
Stationery—retail	June
Steel and iron products—mfr.	June
Sugar, beet—mfr.	March (*) (February)
Theatre building ownership	June
Warehouses, cold storage	March

The frequencies of the selections of months as closing dates, including alternative dates, are as follows:

	<i>Frequencies</i>	<i>% to Total</i>
January	13	9.2
February	7	4.9
March	12	8.5
April	8	5.6
May	10	7.0
June	36	25.4
July	5	3.5
August	4	2.8
September	11	7.7
October	10	7.0
November	12	8.5
December	14	9.9
	<u>142</u>	<u>100.0</u>

From this it appears that if the suggested dates were universally adopted, the use of the calendar year as a business year would be only an average occurrence. While it is not expected that such acceptance of the natural business year will be achieved, attention should be given to its advantages and its more widespread use encouraged.

COLORADO BAR ASSOCIATION SECTION

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Denver, Colo.

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Colorful Convention Planned for State Bar at Colorado Springs

CHARLES A. BEARDSLEY, President of the American Bar Association, will be the main speaker at the annual meeting of the Colorado Bar Association at Colorado Springs on September 22 and 23. The program committee also has received the acceptance of Jacob M. Lashly of St. Louis to talk on the Chandler Bankruptcy Act, Paul F. Hannah of Washington, D. C., Chairman of the Junior Bar Con-

ANNUAL MEETING—SEPTEMBER 22, 23, 1939, Colorado Springs.

ference of the American Bar Association, Governor Ralph L. Carr, and Justices John C. Young and Francis E. Bouck of the Colorado Supreme Court.

With registrations being made far in advance of the usual time, the forty-second annual meeting of the association promises to exceed in attendance any prior convention. Some local associations have selected delegates to be sent to Colorado Springs at the expense of the local group. Western Slope lawyers have estimated that as high as fifty per cent of their membership may be present. The mountain counties are determined to make a serious bid for the 1940 convention, and are sending large delegations to secure next year's meeting place for the Western Slope.

Wilbur Denious of Denver, past president of the association, again plays host to members of the Colorado Bar Association attending the annual convention. He has invited all members of the bar to a luncheon at the Broadmoor Hotel on Friday noon. Entertainment for the luncheon has been left to the indiscretion of the Law Club of Denver, whose members have promised a program unequalled and unexcelled.

Following the delivery of the President's address, by G. Dexter Blount of Denver, the Friday afternoon session will be given over to a discussion of code revision. A highlight of the session will be a debate on the advisability and practicability of revision of the code at this time, and a debate on the desired system to be adopted for appellate procedure.

Mr. Beardsley will deliver an address Friday evening at the Little Theatre on "The Need for Better Justice." As a lecturer in law and a student, a former president of the State Bar of California, a former member of the California Code Commission, and a Lieutenant Commander in the United States Naval Reserve, Mr. Beardsley is well equipped to discuss the subject he has chosen. His background of experience with practically every important phase of the law has enabled him to realize fully the need for better justice.

The Saturday morning session will feature a talk on the Chandler Act by Jacob M. Lashly, who is chairman of the Commercial Law Section of the American Bar Association. He was until recently a member of the Board of Governors of the American Bar Association. Mr. Lashly has specialized in

bankruptcy work and is one of the recognized authorities in the field.

The meeting will close with an annual dinner at the Broadmoor under the guidance of George P. Winters of Denver as toastmaster.

The tentative program of the meeting follows:

FRIDAY, SEPTEMBER 22

(Note: All meetings will commence immediately at time scheduled.)

- 10:00 A. M. Association convenes.
 Report of Committees on Membership—John W. O'Hagan of Greeley, Chairman.
 Election of Members.
 Report of the Executive Committee.
 Report of the Treasurer—Edward C. King of Denver.
 Appointment of Special Auditing Committee.
 Appointment of Nominating Committee.
 Reports of Standing Committees:
 Grievance—Ernest B. Fowler of Denver, Chairman.
 Legal Education—Robert L. Stearns of Boulder, Chairman.
 Legal Biography—Horace N. Hawkins of Denver, Chairman.
 Local Bar Association—Stanley T. Wallbank of Denver, Chairman.
 Judicial Procedure—James L. Cooper of Canon City, Chairman.
 Legal Developments—Frank L. Fetzner of Denver, Chairman.
 Uniform State Laws and Legislation—Charles H. Queary of Denver, Chairman.
 American Citizenship—Leo S. Altman of Pueblo, Chairman.
 Reports of Special Committees:
 Taxation—John L. J. Hart of Denver, Chairman.
 Legal Institutes—William R. Kelly of Greeley, Chairman.
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 Co-operation with American Law Institute, Robert G. Strong of Greeley, Chairman.
 Law Book Publication—Joseph D. Pender of Denver, Chairman.
 Report of Trustees of Old Age Fund—Edward Ring, Chairman; Wilbur Denious of Denver, Treasurer.

ANNUAL MEETING—SEPTEMBER 22, 23, 1939, Colorado Springs.

12:00 M. Luncheon.

Members of the Colorado State Bar Association will be the guests of Wilbur F. Denious, past president of the Association at luncheon. Entertainment at the luncheon will be left to the indiscretion of the Law Club of Denver—Cecil M. Draper, President.

2:15 P. M. Meeting reconvenes.

President's Address—G. Dexter Blount of Denver.

"The Proposed New Rules of Procedure for Colorado."

Meeting under auspices of the Committee on Uniform Procedure in State and Federal Courts—Philip S. Van Cise of Denver, Chairman.

1. "The Committee, its Background, and Scope"—G. Dexter Blount.

2. "The New Rules—a 50-year-old Code, and the Plan of the Committee"—Philip S. Van Cise.

3. "Pros and Cons of the Revision of the Colorado Code"—a debate—

For the Cons: Mark H. Harrington and Horace N. Hawkins, Jr.

For the Pros: Thomas Keely and Joseph Hodges.

4. General Advantages of "Discovery" under the Rules—Edward L. Wood.

5. Appellate Procedure—"Writ of Error or Appeal?"

For Appeal: Jean Breitenstein.

For Writ of Error: Judge R. Hickman Walker.

Discussion from the floor led by Mortimer Stone and Charles J. Simon.

8:30 P. M. Annual Address.

"The Need for Better Justice"—Hon. Charles A. Beard-
sley of Oakland, California, President of the American
Bar Association—Little Theatre, the Broadmoor Hotel.

SATURDAY, SEPTEMBER 23

10:00 A. M. Convention reconvenes.

Report of Auditing Committee.

Discussion of the work and plans of the Junior Bar Conference of the American Bar Association—Paul F. Hannah of Washington, D. C., National Chairman.

"The Chandler Bankruptcy Act"—Jacob M. Lashly of St. Louis, Missouri, Chairman Commercial Law Section of the American Bar Association.

"Local Bar Association Institutes"—Wm. R. Kelly.

- 10:00 A. M. (Continued)
 "Bequests in the Will of Mrs. Charles W. Waterman for Needy Lawyers"—S. Arthur Henry.
 Report of the Delegates to the American Bar Association.
 "Issues and Decisions before the House of Delegates"—L. Ward Bannister.
 "Issues before the Various Bars—Minus the Decisions"—Robert S. Gast.
- 12:00 M. Colorado Junior Bar Conference—Luncheon and Business Meeting.
 Election of Officers.
 Addresses:
 A. Pratt Kesler of Salt Lake City, National Vice-Chairman of the Junior Bar Conference.
 James D. Fellers of Oklahoma City, Councilman of the 10th Circuit, Junior Bar Conference.
- 2:00 P. M. Convention reconvenes.
 "Is There Need for Integration of the Judiciary?"—Justice John C. Young.
 Report of Committee on Revision of By-Laws.
 Special Orders.
 Unfinished Business.
 Nomination of Officers.
 New Business.
 Election of Officers.
- 7:45 P. M. Annual Dinner—Informal.
 Toastmaster—George P. Winters.
 Addresses: Hon. Charles A. Beardsley,
 Jacob M. Lashly,
 Justice Francis E. Bouck,
 Wm. R. Kelly,
 Governor Ralph L. Carr.
 Introduction of President-Elect.
 Entertainment.

* * * * *

The rates at the Broadmoor for rooms with bath, European plan, will be as follows:

\$3.50 per person, single	For corner rooms and lanai suites:
2.75 per person, double	\$5.00 per person, single
2.34 per person, triple	4.00 per person, double.

Accommodations will be assigned by the hotel in the order in which reservation requests are received. For reservations, communicate directly with Mr. Burton R. Ogilvie, Manager, Broadmoor Hotel.

ANNUAL MEETING—SEPTEMBER 22, 23, 1939, Colorado Springs.

El Paso Bar Association Plans Elaborate Entertainment for Wives of Lawyers Attending Annual Convention

The executive committee of the El Paso Bar Association has arranged an extensive and interesting program for the wives of lawyers attending the state bar meeting at Colorado Springs, on the 22nd and 23rd of September. On Friday afternoon the ladies will be entertained at a reception in the Colorado Springs Fine Arts Center, and on Saturday they will be driven up Cheyenne Mountain to the Will Rogers Shrine and the zoo. They will be served luncheon at Cheyenne Lodge.

Mr. and Mrs. John A. Carruthers will be hosts at the reception on Friday afternoon from 4:30 to 6:00 o'clock in the Fine Arts Center. Mr. Carruthers, President of the El Paso Bar Association, was able to secure the Center for this occasion solely for the guests attending the tea. The Fine Arts Center is one of the outstanding attractions of Colorado Springs and houses some very fine art pieces.

On Saturday morning the ladies will leave the Broadmoor Hotel at 11:00 o'clock on the Cheyenne Mountain trip, according to present plans. It is about eight miles to the summit of the mountain from the Broadmoor Hotel. Cheyenne Mountain is approximately 9,000 feet in elevation and rises directly from the plains with no intervening foothills. A wide, double-lined road leads to the summit. Approximately four miles from the hotel is the famed Will Rogers Shrine. A stop will be made at the shrine, and the group will reach the summit at 1:00 o'clock. As guests of the El Paso Bar Association, the ladies will be served luncheon at Cheyenne Lodge. The lodge, located on the summit, is a beautiful Indian Pueblo type of building, and contains a large dining room and lounges. The return trip will bring everyone back to the hotel at 3:30 o'clock.

Spencer Penrose, owner of the Broadmoor Hotel, has complimented the toll charges on the Cheyenne Mountain highway, and there will be no expenses of any sort to the ladies for any of these events.

Mrs. John A. Carruthers is chairwoman of the committee arranging for the entertainment for the ladies. She is assisted by a committee on transportation, which will secure automobiles to take the guests both to the Fine Arts Center and the Cheyenne Mountain Lodge.

ANNUAL MEETING—SEPTEMBER 22, 23, 1939, Colorado Springs.

AFFILIATED GROUPS IN COLORADO BAR ASSOCIATION NOW COVER ENTIRE STATE

Last Two Areas Made Member Associations

WITH the acceptance by the Board of Governors of the Midwestern Colorado Bar Association and Huerfano-Las Animas Counties Bar Association, the Colorado Bar Association, through its affiliated groups, covers every region in the state wherein there are sufficient lawyers to warrant association activities. The Midwestern Colorado Bar Association, which was recently organized, immediately upon its organization petitioned the Board of Governors for admission for state membership. This group will bring approximately twenty-five new members into the state association and will cover the counties of Delta, Montrose, Gunnison, and Hinsdale.

The Huerfano-Las Animas group had not yet completed its organization but will do so prior to the state meeting. As soon as the preliminary organization was set up, it petitioned the Board of Governors of the Colorado Bar Association for admittance to the state association. It will bring approximately twenty-two more lawyers into the state association. Except in thinly populated areas in the western part of the state, all lawyers practicing within Colorado now belong to local associations which have become affiliated with the state association. With the admittance of these last two associations into membership of the state association, the program inaugurated by former President Wilbur Denious, and so ably carried into execution by President G. Dexter Blount, has been consummated.

The reorganization of the Colorado bar in the last two years has gone forward with tremendous strides. For the first time in the history of the legal profession in the state the affiliation movement has brought all members into active contact with each other and unified them into a strong and working organization, which has been of great benefit to the lawyers not only by the very fact of organization alone, but also by reason of such accomplishments as the legal institutes which have been so successfully sponsored by the state association.

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Through the means of DICTA each member of the state association is thoroughly informed of the activities of not only the local associations and state associations, but also of various local items, which are of interest to the profession generally. Thus the purpose of the state association is being accomplished by reason of its usefulness to its members.

Fred Y. Holland, Secretary of the Association, Is Dead

Fred Y. Holland, beloved secretary of the Colorado Bar Association, died at Fitzsimons Hospital on August 16, 1939.

Born in Murray, Kentucky, in 1895, Mr. Holland left his birthplace shortly before the outbreak of the World War to enter George Washington University at Washington, D. C. When the United States entered the war, he was among the first to join the army and he served for twenty-three months overseas with the Second Division. He was injured and gassed while in the service, and this contributed to the causes which resulted in his death.

Emerging from his war service with the rank of second lieutenant and with broken health, he came to Colorado and entered the law school at the state university. His poor physical condition was unable to stand the strain of his studies, and he left his law courses for a year to recuperate in a mountain cabin.

The following year he entered Westminster Law School, from which he was graduated with a bachelor of law degree. He was married to Miss Dorothy Stokoe of Michigan on October 9, 1920.

In 1923 he was appointed clerk of the Colorado state senate and after adjournment of the senate was made librarian of the Supreme Court, which position he held at the time of his death. From 1936 to 1937, he served as president of the National Law Librarians Association. He was appointed by President G. Dexter Blount as the first secretary of the reorganized Colorado Bar Association in September, 1938, and was serving in that capacity at the time of his death.

He devoted long hours to the secretaryship and his enthusiasm and ability to cooperate with the members and offi-

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cers of the association marked him as a successful secretary. He contributed ideas, time, and labor to the new association and to him much credit for its success is due.

He was also active in the work of the American Bar Association, and attended the recent convention in San Francisco. At the time of his death he had outlined and planned many of the details of the forthcoming convention of the state association.

He was a member of the American Legion, the Forty and Eight, Veterans of Foreign Wars, and Disabled American Veterans. He was serving at the time of his death as grand worshipful master of Greenleaf Lodge Number 169 of the Masonic order, and was a member of the Scottish Rite in the Rocky Mountain Consistory Number 2, and the El Jebel Mosque.

Funeral services were held on August 18, and burial was in the veterans' plot at Fairmount Cemetery. Masonic services were conducted at the grave. He is survived by his wife, son, a brother and a sister.

Ill health prevented Fred Y. Holland from attaining the greatest ambition of his life—to practice law. But his ill health did not prevent him from attaining a cherished place in the memories of his fellow lawyers.

Legal Institute Held at Durango

The Southwestern Colorado Bar Association, on August 19, 1939, held a successful legal institute at Durango. Approximately twenty-four lawyers were present. The meeting commenced on Saturday afternoon and lasted during the evening. Mr. Albert Gould of Denver was in charge of the afternoon session, having for its topic "Tax Highlights for the Busy Lawyer." Mr. Stanley Wallbank of Denver led the evening session, which was devoted to the discussion of problems of administrative law.

At the dinner meeting, President G. Dexter Blount of Denver discussed briefly the activities of the state association and urged all lawyers to attend the state meeting at Colorado Springs on September 22 and 23, 1939. James M. Noland of Durango presided at the institute. After the dinner he

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turned over the office as president of the Southwestern Colorado Bar Association to J. J. Downey of Cortez, who was elected to succeed Mr. Noland.

Mr. Blount's description of the activities of the state association and of the forthcoming annual convention met with such an enthusiastic response that members of the association voted to send a paid representative to the state meeting, and at least six attorneys signified their intention of coming to the annual meeting at Colorado Springs of the state association.

A. B. A. Will Hold Regional Conference of Bar Officials at Colorado Springs

The regional conference of the Section on Bar Association Activities of the American Bar Association for the states comprising the tenth circuit will be held at the Broadmoor Hotel, Colorado Springs, on Sunday, September 24, immediately following the annual convention of the Colorado State Bar Association.

R. F. Maguire, of Orlando, Florida, chairman of the Section of Bar Organization Activities in the American Bar Association, will preside at the meeting, and Charles A. Beardsley of Oakland, California, President of the American Bar Association, will address the meeting. It is expected that bar association officials from New Mexico, Wyoming, Utah and Colorado will be present at the meeting. Present indications are that more than fifty officials from the various associations will be in attendance.

This meeting is the first of the regional conventions to be held this year under the auspices of the American Bar Association. Arrangements for the meeting have been made locally by a committee headed by James A. Woods of Denver. Wm. R. Kelly of Greeley, and G. Dexter Blount. Invitations have been sent not only to the state bar association officials in the various states, but also to all important local bar association officials within the tenth circuit. Some of these officials plan to attend several sessions of the annual meeting of the Colorado Bar Association.

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Las Animas-Huerfano Bar Organizes

Twelve members of the Trinidad bar met at the country club on the evening of August 11th to consider the matter of organizing a bar association. Mr. B. H. Shattuck was elected chairman and presided over the meeting. It was unanimously voted to perfect an association, and that members of the bar in Walsenburg should be invited to participate, so that both Huerfano and Las Animas counties would be included. By unanimous vote the chairman was authorized to appoint a committee of six, to include himself, to draft by-laws and report back at a subsequent meeting to be held September 2nd. The following committee was named:

Judge John L. East	Judge J. Edgar Chenoweth
B. H. Shattuck	Henry Hunter
Frank H. Hall	John N. Mabry

When the organization is perfected, the association plans to petition the state association for membership.

—*Judge J. Edgar Chenoweth, Correspondent.*

El Paso Bar Elects Officers

The annual meeting of the El Paso County Bar Association was held in August, and the following officers elected:

JOHN A. CARRUTHERSPresident
WILLARD SIMMONSVice-President
CLYDE BABCOCKSecretary
PAUL S. FRIESTreasurer

Sperry S. Packard of Pueblo, spoke to the meeting on "Recent Changes in Bankruptcy."

David P. Strickler presented films on the Myron Stratton Home.

—*Charles J. Simon, Correspondent.*

Weld County Bar Association Meets

Weld County Bar Association held its regular monthly meeting on August 28, 1939, at which there were thirty members present. M. E. H. Smith, president of the association, presided at the luncheon meeting.

Wm. R. Kelley, president-elect of the Colorado Bar Association, gave an interesting and vivid report on the annual convention of the American Bar Association held in San Francisco last month.

The Weld County Bar Association has made what

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amounts to a pledge to pay its dues in full to the state association for all members enrolled in the local association for the forthcoming year before the date of the annual meeting of the state bar association at Colorado Springs. To date, about fifty per cent of the members have paid their dues.

Present at the meeting as guests of the association were: Angelo F. Mosco of Walsenburg, Elmer Cogburn of Denver, and Elmer Bennett and William Southard, both of whom are law students and residents of Weld County.

—J. W. O'Hagan, *Correspondent.*

Robert G. Smith of Greeley, chairman of the Committee on Cooperation with American Law Institutes, has been seriously ill and confined to a hospital since July 24th. He is reported to be recuperating, but it will be some time before he can again engage in his practice.

Wm. Hedges Robinson, Jr., of Denver was appointed as Secretary of the state bar association by G. Dexter Blount, president. The appointment was made following the death of Mr. Fred Holland.

Committees have been appointed by the new President of the El Paso Bar Association to arrange for entertainment of lawyers and their wives, at the annual meeting of the Colorado Bar Association in September. Details have not been sufficiently worked out to announce at this time.

The Colorado Springs Clearing House Association has arranged for an address by Gilbert K. Stevenson, who has been active in the Trust Section of the American Bar Association, upon "The Lawyer's Part in Trust Administration." The date, a luncheon meeting at Colorado Springs on October 4th. Interested lawyers are invited to communicate if they wish to attend.

CORRECTION—Mr. Robert L. Stearns calls attention to page 263 of the August DICTA, in which it is erroneously reported that Mr. Stearns was elected chairman of the Section on Legal Education and ipso facto became a member of the House of Delegates to the American Bar Association.

Mr. Stearns was elected vice-chairman of the Section, a position which does not carry with it membership in the House of Delegates.

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Supreme Court Decisions

CRIMINAL LAW—RECEIVING STOLEN PROPERTY—*Burnham v. People*
—No. 14569—Decided June 12, 1939—District Court of Pueblo
—Hon. Harry Leddy, Judge—Affirmed.

HELD: 1. It is not necessary to convict one charged with receiving stolen property that there be direct proof of his knowledge that the goods had been larcenously obtained.

2. Facts examined and found to be sufficient to clearly establish the jury's finding that defendant knew goods were stolen.

3. It was not error for the trial court to admit in evidence two articles stolen from the store of prosecuting witness, although such articles were not found in possession of defendant, for they were admitted only for the purpose of establishing that there was a theft.

4. "One of the necessary elements of the crime of receiving stolen property is that the property has, in fact, been stolen by someone other than the one charged with receiving it."

5. Evidence of thefts of other goods from the same owner by the same thief is admissible where it is connected with the same transaction.

6. It is unnecessary for the prosecution to elicit from the thieves the information as to the theft where such evidence was otherwise clearly established.

7. Affidavits filed to impeach verdict examined and found not to warrant making an exception to the general rule of *Boyles v. People*, 90 Colo. 32, 6 P. (2nd) 7, to effect that affidavits of jurors are inadmissible to impeach their verdict.

Opinion by Mr. Justice Bakke. Mr. Justice Bouck not participating. EN BANC.

MURDER—SELF-DEFENSE—INSTRUCTIONS—EVIDENCE—CONSTITUTIONAL LAW—*Agnes v. People*—No. 14471—Decided June 26, 1939—District Court of Denver—Hon. Stanley H. Johnson, Judge—Affirmed.

HELD: 1. Evidence reviewed and found to fully warrant jury's verdict of guilty of murder in the first degree.

2. A statement made by decedent to her mother that "Angelo is going to take me over to Five Points to beat me up," made in presence of defendant, is admissible in evidence.

3. Voluntary statements of decedent, 15 minutes after shooting, that "Angelo shot me; Angelo did it," are statements of facts and not of opinion; and where defendant admitted in a statement made shortly after his arrest, that he shot her, "the admission of such statements, whether

they were dying declarations, res gestae or otherwise, was not prejudicial to defendant."

4. Where jury has been instructed that if there was any reasonable doubt in their minds as to the matter of self-defense, they must acquit; and where they are told that unless they believed or entertained a reasonable doubt on the subject, they could not properly find that defendant shot in self-defense, and that the killing was justified, there is no prejudicial error in giving an instruction to effect that if they "believe beyond a reasonable doubt that defendant in killing * * * (wife) was not acting in self-defense against Roy Finley, the killing was not justified, and you should proceed to determine degree of his guilt, in accordance with the preceding instructions."

5. An instruction which begins "If you jury believe," without including the words "from the evidence" is not per se prejudicial, particularly where many other instructions are given containing the phrase.

6. An instruction to effect that if the shot in question was fired with deliberation and premeditation, with malice aforethought, with intent to kill Finley, but killing wife instead, makes defendant guilty, is proper, and it was immaterial that such deliberation, premeditation and malice were not directed against the decedent.

7. Articles V and VI of the amendments to the Federal Constitution are not limitations upon the state government, but impose limitations on the Federal government only.

8. Where defendant was present during all the proceedings up to and at the time of conviction there is no violation of the Colorado Constitution, Article II, Section 16.

9. Chapter 95, S. L. 1905, page 199 does not apply where one is convicted of murder and the punishment fixed at death, and Section 538, Chapter 48, 1935 C. S. A., does apply to effect that after sentence the sheriff shall deliver defendant to warden in the penitentiary, "who shall keep such convict in solitary confinement until the infliction of the death penalty."

Opinion by Mr. Justice Bock. Mr. Justice Bouck not participating. EN BANC.

CIVIL SERVICE COMMISSION—RESIGNATIONS—WITHDRAWAL OF RESIGNATIONS—EVIDENCE—ACTION OF BOARD—*Ira R. Taylor v. Board of Control of the State Industrial School, et al.*—No. 14556—Decided June 26, 1939—District Court of Denver—Hon. Stanley H. Johnson, Judge—Affirmed.

FACTS: 1. Action of mandate to compel reinstatement of Taylor as superintendent of State Industrial School, and to compel payment of salary if it be determined he is entitled to the office. Petition dismissed, and Taylor seeks reversal.

2. Taylor was in classified civil service of the state, and assumed duties March 2, 1937. On August 17, 1938, Taylor wrote board, presenting his resignation, effective January 1, 1939.

3. On December 16, 1939, board acted upon resignation and accepted same. December 17, 1939, Taylor requested withdrawal of resignation, basing its presentation on a mistake. The board advised Taylor of acceptance of resignation on December 27, 1938. By letter of December 30, 1938, Taylor advised board of his refusal to recognize action of board, and on same day board wrote letter to Taylor informing him of board's refusal to accept withdrawal of resignation.

HELD: 1. Lack of sufficient proof to establish right of reinstatement.

2. No proof being offered concerning mistake, court could not consider the matter.

3. The lower court did not err in finding that State Civil Service Commission accepted resignation of Taylor, since right to revoke his resignation was dependent upon its not having been accepted by commission before he attempted to withdraw it.

4. Taylor had right to resign subject to state's correlative right to refuse to accept where it would result in injury to the public, and, granting such right, the commission could and did accept Taylor's resignation, and his attempt to withdraw it was futile.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Hilliard and Mr. Justice Young concur. IN DEPARTMENT.

ASSAULT AND BATTERY—EXEMPLARY DAMAGES—EVIDENCE—MOTION FOR NEW TRIAL—SURPRISE AND ACCIDENT—FALSE STATEMENT—CROSS-EXAMINATION—COLLATERAL ISSUE—DISCRETION OF LOWER COURT—*Schlessman v. Brainard*—No. 14386—*Decided June 26, 1939*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Affirmed*.

FACTS: 1. B brought action for assault and battery and for actual and exemplary damages, the latter being based upon the defendant's guilt of wanton and reckless disregard of plaintiff's rights and feelings.

2. Defendant denied allegations of complaint and affirmatively alleged: Provocation by plaintiff, accord and satisfaction, disturbance by plaintiff which defendant was lawfully trying to suppress. By cross-complaint, defendant sought to recover for defamation, seeking actual and exemplary damages.

3. Verdict for plaintiff—defendant's motion for new trial overruled and judgment entered.

HELD: 1. Contention that court erred in permitting the jury to award exemplary damages because of insufficiency of evidence cannot be considered because:

a. Such damages are recoverable where wrongful act was committed recklessly, wantonly, or without provocation or excuse.

b. On highly conflicting evidence, jury's resolution thereon will be upheld where there is evidence of the necessary elements upon which jury could exercise its discretion.

2. As to motion for new trial based upon accident and surprise occurring at the trial in that a disinterested witness had testified that he had heard, at scene of the altercation, the wife of the defendant express surprise at the defendant's conduct, which statement was in conflict with statement of witness previously given to defendant that he had heard nothing at the scene, the court held adversely to defendant's contention on the grounds:

a. The witness had made statements on another matter, which were brought forward by defendant without proceeding into the alleged prejudicial statement.

b. Said witness was not cross-examined on the matter by the defendant.

c. Manifesting the surprise after verdict is not timely.

d. False testimony is generally not a ground for new trial, unless induced by the party benefiting thereby.

e. Remark was obviously on a collateral issue.

f. Such evidence should be of such character as would probably change the result.

g. Where lower court has exercised its discretion on the matter, appellate court will not reverse save for an abuse thereof.

Opinion by Mr. Justice Knous. Mr. Chief Justice Hilliard and Mr. Justice Young concur. IN DEPARTMENT.

TAXATION—FEES—COLLECTION—OWNERSHIP—CONSTRUCTION OF STATUTES—*The Moffat Tunnel Improvement District, a Colorado Corporation, plaintiff in error, v. John F. McGuire, Manager of Revenue and Ex-Officio Treasurer of the City and County of Denver, defendant in error*—No. 14322—Decided February 6, 1939—Error to the District Court of the City and County of Denver—Hon. Joseph J. Walsh, Judge—Judgment Affirmed.

FACTS: 1. Suit by the Moffat Tunnel Improvement District to recover certain fees from McGuire in his official capacity, collected by him in connection with sales for Moffat Tunnel Assessments and redemption from such sales.

2. It was conceded by both sides that the treasurer of every county wholly or partly within the district, including city and county of Denver, is vested by statutory authority to collect the fees, but the district contended that such fees belonged to it and not to the treasurer or to said city and county. Judgment below for treasurer.

HELD: 1. Fees collected under authority by an officer for a public service presumably become the property of the officer authorized to collect them.

2. It is not unusual to designate an officer of one governmental unit to perform services for an entirely different governmental unit in

the interest of public economy, concerning which the legislative authority may use its discretion.

3. Absent express statutory provision that fees go into the district treasury, the trial court rightly decided the fees belonged to the treasury of the city and county of Denver.

Opinion by Mr. Justice Bouck. Mr. Justice Bock not participating.
EN BANC.

CRIMINAL LAW—EVIDENCE—INSTRUCTIONS—PRIMA FACIE CASE—

DIRECTED VERDICT—*John Beery, plaintiff in error, v. The People of the State of Colorado, defendant in error*—No. 14496—*Decided February 6, 1939*—*Error to the District Court of the City and County of Denver*—Hon. Joseph J. Walsh, Judge—*On application for supersedeas*—*Judgment Affirmed.*

HELD: Without stating any facts, court affirmed judgment of conviction in grand larceny case, holding that no serious violation of recognized rules for admitting evidence was shown; that instructions were ample and adequate; and that prima facie case was made on evidence wholly circumstantial and not inherently unconvincing, absent any evidence by defendant to overcome it except by cross-examination of some of the People's witnesses. Trial court, therefore, rightly refused to direct an acquittal.

Opinion by Mr. Justice Bouck. IN DEPARTMENT.

PROMISSORY NOTES—SURETIES—PERSONS PRIMARILY LIABLE—EN-

DORSEMENTS—RELEASE OF GUARANTOR—*Winton v. Sullivan*—No. 14542—*Decided June 12, 1939*—*District Court of Arapahoe County*—Hon. H. E. Munson, Judge—*Reversed.*

HELD: 1. A surety or accommodation party to a negotiable instrument is primarily liable.

2. An endorsement on a promissory note, as follows: "Demand notice and protest waived. Payment guaranteed." makes the endorser a surety or accommodation endorser within the meaning of '35 C. S. A., C. 112, Sec. 29.

3. Where, in the negotiation of a loan, a note is signed by defendant as vice-president of the maker, and endorsed by him personally before delivery, guaranteeing payment, and where the assignee of payee receives a payment of 20% on the note from a stranger to the instrument, and accepts same in full settlement of claim against maker, without consent of guarantor (defendant), latter may not contend that he is released from further liability on the note.

Opinion by Mr. Justice Bock. Mr. Justice Bouck not participating.
EN BANC.

TAXES—RECOVERY OF TAXES PAID UNDER MISTAKE OR ERROR—*Stephens & Co. v. Board of Equalization, etc.*—No. 14470—*Decided July 3, 1939*—*District Court of Denver*—*Hon. George F. Dunklee, Judge*—*Affirmed*.

HELD: 1. Where, in a case filed by plaintiff in error to recover taxes paid, it appears that plaintiff voluntarily paid the taxes, that the error involved was due solely to calculations contained in plaintiff in error's own tax schedule; that the schedule was voluntarily made by it; that the error was due solely to plaintiff in error's own negligence and not to any action of the taxing agencies; that the facts which show the mistake were in the sole possession of the taxpayer, the plaintiff in error is barred from any recovery.

Opinion by Mr. Justice Bock. Mr. Justice Knous and Mr. Chief Justice Hilliard concur. IN DEPARTMENT.

WILLS — TRUSTS — BENEFICIARIES — APPOINTEES — MUNICIPAL CORPORATIONS — CORPORATIONS — RENUNCIATION OF APPOINTEES—EFFECTS OF RENUNCIATION—*People, et al. v. City and County of Denver, et al.*—No. 14477—*Decided July 3, 1939*—*County Court of Lake County (Estate of Samuel D. Nicholson, deceased)*—*Hon. Thomas Evans, Judge*—*Affirmed*.

FACTS: 1. Reversal sought of judgment approving contract having effect of terminating a trust and directing trustees to pay over to contracting parties corpus of the trust.

2. Testator left surviving two children, Edward and Ruth, and made provision for certain payments per month during their lifetime, and also made provisions for certain monthly annuities to nieces, nephews and grandchildren until they reached ages 24. Latter beneficiaries, except one who has attained majority and a minor passed age of 24 years. Testator's child, Ruth, died.

3. Ruth's death left Edward sole heir of testator, and he was sole heir of Ruth. Corpus of estate was in excess of \$900,000.00.

4. Testator provided for bank to hold in trust rest and remainder of estate, and upon death of his children to pay over one-half to hospital for erection of a wing to hospital, and the other half to be given to City of Denver for erection of monument.

5. Subsequently agreement entered into by Edward, City and County of Denver (authorized by City Council), and hospital, whereby certain amount was to be paid on certain day to Edward, to Ruth B. Nicholson (part of which was for establishment of annuity), to Samuel D. Nicholson II (annuity as to part thereof created), to City and County of Denver, and to hospital.

HELD: 1. Disposition of cause requires no determination of question of the appealable interest of trustee, or of the question of the qualification of the judge by reason of interest.

2. Trust created not a spendthrift trust: did not provide against improvidence or incapacity; lacked clear intention to create such trust.

3. The hospital and city are merely prospective appointees to be appointed by the trustee bank upon Edward's death.

4. Will speaks as of time of death of testator. Conditions under which the bank's power of appointment will become capable of being exercised are sure to happen. Such exercise of power can fail only if appointees become incapable of taking, or if they refuse to accept appointments.

5. Both hospital and city, being *sui juris*, may accept or refuse appointments, as they see fit.

6. Because of dire straits of hospital there may be failure of power to appoint by reason of incapacity. In such case, there being no devise over, Edward would take as heir. By the contract he surrendered that right, and the hospital by such contract renounced and waived its appointment, thereby vesting Edward with its interest.

7. City likewise renounced and waived its appointment by entering into the agreement, which action the city by constitutional provision had the power to do.

8. The present city council can bind the council existent at time of Edward's death, where others have surrendered or acquired rights by reason thereof.

9. "Upon the vesting of the estate in Edward with the consequent termination of the trust created by the will, the trustee bank has no further interest, and may not determine or control the manner in which Edward shall deal with the estate vested in him. In making gifts to his children and directly to charity, in providing for the retention of a part of the estate by himself and in setting up a trust to secure payment of an annuity to himself and his wife for their lives with gifts over to the city and the hospital, he is merely exercising his right to deal with his own property as his judgment directs and this he may lawfully do."

Opinion by Mr. Justice Young. Mr. Justice Bouck not participating. EN BANC.

WORKMEN'S COMPENSATION—STATUTE OF LIMITATIONS—*Moreno et al. v. Industrial Commission*—No. 14539—*Decided July 3, 1939*—*District Court of Denver*—*Hon. Joseph J. Walsh, Judge*—*Affirmed*.

HELD: 1. The furnishing of a burial plot for decedent, by employer, is not to be considered as the payment of compensation such as is necessary to take the case out of the statute of limitations, which requires filing of notice of claim within six months after the injury or within one year after death resulting therefrom.

Opinion by Mr. Justice Knous. Mr. Chief Justice Hilliard and Mr. Justice Young concur. IN DEPARTMENT.

CRIMINAL LAW—MURDER—EVIDENCE—JURY—*Catalina v. People*—No. 14491—*Decided July 3, 1939*—*District Court of Chaffee County*—*Hon. James L. Cooper, Judge*—*Affirmed*.

HELD: 1. Evidence reviewed and found to support verdict of jury.

2. Where jury upon competent testimony arrives at verdict of guilty of murder in the first degree, it is its duty to fix the penalty and there is no warrant for interference by the court.

3. Court properly refused admission of testimony that deceased had a reputation for quarrelsomeness, since there was no evidence that defendant knew deceased prior to night of shooting, and it did not appear that he had ever heard of him or his reputation.

4. While the jury should not have been permitted to attend a theater during the progress of the trial, considering the gravity of the charge and the extreme penalty involved, there is no prejudicial error since no specific prejudice by reason of this occurrence was shown.

Opinion by Mr. Chief Justice Hilliard. Mr. Justice Bouck not participating. EN BANC.

LEASES — ABANDONMENT — SURRENDER — BALANCE OF RENT — ESTOPPEL—*Bastien v. Bronstine*—No. 14428—*Decided June 26, 1939*—*District Court of Denver*—*Hon. George F. Dunklee, Judge*—*Affirmed*.

FACTS: Plaintiff, as lessor, rented real estate to defendant, as lessee, for a period of one year under written lease providing that lessee had paid first and last month's rent, and that if lessee leaves premises vacant, lessor may sue for balance due for unexpired term unless lessor rents same, and in that event, such rent to be applied on claim before expiration date; and lessor sues for balance of rent except for last month. Lessee defended on ground that typewritten paragraph in lease as to payment of rent for last month converted the action into one at common law for damages, and that case, therefore, should have been submitted to jury. Trial court thought otherwise and directed verdict for plaintiff.

HELD: 1. Evidence examined and found to be insufficient to establish any acceptance of a surrender; or any basis for estoppel. The facts clearly show an abandonment of the lease by the lessee.

2. The only possible question the court would have been justified in submitting to the jury was one concerning lessor's failure to comply with terms of the lease, and there was no evidence at all on that point.

3. The damages are liquidated, and there is no ambiguity concerning the clauses in the lease relative to them.

4. The court did not err in rejecting offer of testimony of defendant to effect that plaintiff would have the last month's rent in event defendant found other premises, for such offer was an attempt to vary the terms of the lease, and the language of the contract needed no explanation.

5. The fact that lessee left key with lessor and that lessor did

nothing except bring suit after expiration of lease, does not destroy lessor's rights to balance of rent.

6. There are not sufficient facts to sustain defendant's allegation of estoppel, particularly since landlord did not agree to, and did not accept, tenant's surrender of the premises.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Hilliard and Mr. Justice Burke concur. IN DEPARTMENT.

CONSTITUTIONAL CONSTRUCTION—ADMISSION—OLD AGE PENSION AMENDMENT—DECLARATORY JUDGMENT—*Fairall, et al. v. J. Charles Frisbee*—No. 14411—Decided July 3, 1939—County Court of Denver—Hon. Homer G. Preston, Judge—Reversed.

FACTS: 1. Frisbee asked for declaration of rights against administrative bodies as to status as pensioner, and for \$45.00 pension for September, 1937, and additional \$15.00 for months of January to August, inclusive, over \$30.00 received.

2. Demurrer thereto overruled; demurrants elected to stand, and judgment for Frisbee in the sum of \$165.00 entered.

HELD: 1. Old Age Pension Amendment being self-executing only as to establishment of fund, court erred in adjudging \$120.00 for months of January to August, inclusive, in favor of Frisbee.

2. Admission of receipt of \$30.00 until September 1, 1937, prior to act of legislation affecting Old Age Pension Amendment, automatically disposed of alleged cause of action for said months of January to August.

3. Because record disclosed that Frisbee's status of old age was already established, there was nothing left for determination under Declaratory Judgments Law.

Opinion by Mr. Justice Bakke. Mr. Justice Bouck not participating. EN BANC.

ESTATES—WILLS—PROBATE—SETTING ASIDE PROBATE—*In re: Estate of Sullivan v. Sullivan, et al.*—No. 14472—Decided June 26, 1939—County Court of Weld County—Hon. Robert G. Strong, Judge—Affirmed.

FACTS: Trial court denied petition of plaintiff in error to vacate the judgment admitting her mother's will to probate. She alleged that she executed a waiver consenting to the setting of the will for probate; but that her consent was secured by fraud and deceit, etc.

HELD: 1. A County Court may, upon proper grounds, revoke the probate of a will.

2. "* * * whether the petition is based upon the inherent right of the county court to afford relief, or upon the code provision (Sec. 81 pertaining to relief from civil judgments), the application is discretionary with the trial court."

3. The appellate court will not interfere unless a gross abuse of discretion appears.

Opinion by Mr. Justice Knous. Mr. Justice Young and Mr. Justice Bakke concur. IN DEPARTMENT.